BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ADDIE M. MILLER	)	
Claimant	)	
VS.	)	
	)	Docket No. 261,608
BORG-WARNER STAFFING	)	
and YORK UPG WICHITA	)	
Respondents	)	
AND	)	
	)	
LUMBERMENS MUTUAL CASUALTY	)	
and CONSTITUTION STATES	)	
Insurance Carriers	)	

ORDER

Borg-Warner Staffing and its insurance carrier, Lumbermens Mutual Casualty, appealed the February 20, 2001 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

Claimant alleges that she injured her back while working for both Borg-Warner Staffing (Borg-Warner) and York UPG Wichita (York) on July 15, 2000, and each and every workday after that date. On June 30, 2000, Borg-Warner, a temporary employment company, assigned claimant to work at York. Claimant worked at the York facility through September 1, 2000, having become a York employee on August 16, 2000.

In the February 20, 2001 preliminary hearing Order, Judge Clark assessed liability against Borg-Warner and Lumbermens Mutual Casualty (Lumbermens) after finding that claimant sustained injury from July 15, 2000, through August 7, 2000.

Borg-Warner and Lumbermens contend Judge Clark erred. They appealed the preliminary hearing Order, requesting the Board to review whether claimant met with personal injury by accident arising out of and in the course of employment and whether claimant provided timely notice of accident.

York and its insurance carrier, Constitution States, filed a brief with the Board arguing that claimant should not receive any benefits in this claim. But in the event benefits are awarded, York and Constitution States contend Borg-Warner and Lumbermens should be responsible as claimant actually worked as a direct employee of York for only seven days, all of which was spent working on light duty. York and Constitution States contend that claimant has failed to prove that she injured her back while working for either employer as the doctors' opinions that address causation are predicated upon a history that claimant lifted heavier weights than she actually handled. In addition, York and Constitution States argue that claimant failed to provide timely notice of the accidental injury to either employer as claimant should have given notice within 10 days of July 15, 2000, the date that she began having hip symptoms. Finally, York and Constitution States contend that the Board does not have jurisdiction in a preliminary hearing appeal to determine the appropriate date of accident and, therefore, the Board may not review the evidence and determine that the appropriate date of accident falls on a date that claimant was York's employee.

Conversely, claimant argues in her brief to the Board that the preliminary hearing Order should be affirmed.

The issues before the Board on this appeal are:

1. Did claimant injure her back while working for Borg-Warner or York UPG Wichita during the period alleged?

2. Did claimant provide her employers with timely notice of the accidental injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds and concludes:

1. The preliminary hearing Order should be affirmed.

2. The Board adopts the Judge's findings and conclusions that it is more probably true than not that claimant injured her back while working for Borg-Warner from July 15, 2000, through August 7, 2000. During that period, claimant was working at the York UPG Wichita plant where she had been assigned by Borg-Warner, a temporary personnel services company. Claimant's regular job assignment was to handle and insulate air conditioner panels eight hours per day, five days per week. Claimant thought the panels were heavy.

3. Although claimant may not have lifted the 40 to 65 pounds as she apparently advised Dr. Pedro Murati or the 50 pounds that she apparently advised Dr. Paul Davis, that discrepancy is not critical considering claimant's description of her job duties and the fact that she had no back problems until she began working with the panels. Considering the entire record, claimant has established a prima facie case that she either ruptured a disk

in her low back or aggravated a preexisting disk rupture due to the work that she did for Borg-Warner at the York plant through August 7, 2000.

4. The Board affirms the Judge's finding that August 7, 2000, is the appropriate date of accident for this repetitive injury or mini-traumas claim. After working at the York plant for approximately two weeks, claimant began experiencing symptoms in her hip that she attributed to the repetitive lifting and the handling of air conditioner panels. On approximately July 15, 2000, claimant began noticing the hip symptoms, which worsened as she continued to work. On approximately August 7 or 8, 2000, claimant sought chiropractic treatment and was taken off work for approximately one week. At that time, claimant learned that her symptoms were related to her low back. Claimant returned to work with restrictions on approximately August 14, 2000, and was assigned light duty work testing for leaks in air conditioners, which she performed through her last day of work at the York plant on September 1, 2000.

Following creation of the bright line rule in the 1994 *Berry*[1] decision, the appellate courts have grappled with determining the date of accident for repetitive use injuries. In *Treaster*,[2] which is one of the most recent decisions on point, the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use or mini-traumas (which this is) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. *Treaster* can also be interpreted as focusing upon the offending work activity that caused the worker's injury as it holds that the appropriate date of accident for a repetitive use injury can be the last date that the worker performed his or her work duties before being moved to a substantially different accommodated position.

> Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.[3]
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> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the

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[1] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[2] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

[3] *Treaster*, syl. 3.

> claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[4]

The light duty job was assigned to claimant to accommodate her work restrictions and, therefore, claimant experienced a significant change in job duties when she moved from the more strenuous and more physical job of insulating panels to testing for leaks. Therefore, claimant's last day spent insulating panels (approximately August 7, 2000) should be considered the date of accident for purposes of this claim.

5. The Board also affirms the Judge's conclusion that claimant provided timely notice of the accidental injury as required by K.S.A. 44-520. As confirmed by her York supervisor, Kenneth Presley, claimant told him on approximately August 7 or 8, 2000, about her complaints and related them to her work. Claimant's testimony is also uncontroverted that she gave the chiropractic slips that she was receiving to a woman named Nancy who worked for Borg-Warner. Claimant testified, in part:

> Q. (Mr. Bryan) And did you keep going to the chiropractor?
>
> A. (Claimant) Yes. I kept going to the chiropractor until I just couldn't afford to go no more.
>
> Q. Did you talk with anybody at work about going and getting any other type of medical treatment?
>
> A. Well, when I went to Borg-Warner at that one day that lady told me -- she said, well, Addie, we could send you to our doctor. And that's all she told me and I never went to no doctor. And she said, well, you was getting ready to be hired by Borg-Warner [York] and you was off work, which I was off for a week with my back, and the next thing I knew -- that's all she told me. They never did send me to no doctor.
>
> Q. What lady was that?
>
> A. I'm not sure. I believe her name was Nancy but I'm not sure.
>
> Q. Who did she work for?

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[4] *Treaster*, syl. 4.

A. Borg-Warner.[5]

That notice is timely as claimant continued to perform her regular job duties through approximately August 7, 2000. The Board finds and concludes that claimant provided notice to both York and Borg-Warner within 10 days of the August 7, 2000 accident date.

6. The Board has jurisdiction in a preliminary hearing appeal to determine the accident date when it is a fact that is critical in determining whether an accident arose out of and in the course of employment when two or more employers are involved in the claim. Therefore, York and Constitution State's argument that the Board does not have jurisdiction at this juncture of the claim to address the accident date is without merit.

WHEREFORE, the Board affirms the February 20, 2001 preliminary hearing Order entered by Judge Clark.

IT IS SO ORDERED.

Dated this ____ day of May 2001.

BOARD MEMBER

c: David M. Bryan, Wichita, KS
Edward D. Heath, Jr., Wichita, KS
Gary K. Albin, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director

[5] Preliminary Hearing, February 20, 2001; pp. 13, 14.